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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION TWO

THE PEOPLE, Plaintiff and Respondent, v. RAUL ANTONIO ARRIAGA, Defendant and Appellant.	B200601 (Los Angeles County Super. Ct. No. YA064214)

APPEAL from a judgment of the Superior Court of Los Angeles County. Mark S. Arnold, Judge. Affirmed.

Dennis L. Cava, under appointment by the Court of Appeal, for Defendant and Appellant.

Edmund G. Brown, Jr., Attorney General, Dane R. Gillette, Chief Assistant Attorney General, Pamela C. Hamanaka, Assistant Attorney General, Scott A. Taryle and Stacy S. Schwartz, Deputy Attorneys General, for Plaintiff and Respondent.

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After a court trial, Raul Antonio Arriaga (appellant) was found guilty of lewd acts with a child under 14 years of age in violation of Penal Code section 288, subdivision (a).[1] The trial court sentenced appellant to six years in state prison.

Appellant appeals on the grounds that: (1) he was denied his right to present a defense under the Fifth, Sixth, and Fourteenth Amendments and article I, sections 7 and 15 of the State Constitution when the trial court ruled inadmissible third-party culpability evidence and propensity evidence relating to the third party, (2) assuming arguendo that appellant's claim is meritorious and that defense counsel failed to preserve this issue, appellant was denied effective assistance of counsel.

FACTS

E. testified that she was 14 at the time of trial in 2006. In 2000, she was living with her mother, E.A., and father, L. She identified appellant as her maternal uncle. From 2000 to 2002 the family lived in a house where appellant would spend a lot of time with her parents and their eight children. Appellant would sleep in the living room of their house three to five times a week. When E. was eight, she got up at night to check on her cat, and when she returned to bed, appellant entered her room. Appellant picked her up, took her to the living room, and placed her on the couch where he removed her pajama pants. He then performed oral sex on her and rubbed her breasts. He placed his fingers inside her vagina.

On another night, appellant entered E.'s room and began licking her toes. He then removed her pajama bottoms, performed oral sex on her, and placed his fingers inside her

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[1] Under a negotiated agreement, appellant waived his right to a jury trial. In exchange, appellant was granted dismissal of counts 1 and 2, which charged him with continuous sexual abuse of E., a child under 14 years of age (count 1) and continuous sexual abuse of J., a child under 14 years of age (count 2), in violation of Penal Code section 288.5, subdivision (a). The prosecutor amended the information to allege count 3, lewd acts against E. The trial court also agreed that appellant's maximum sentence would be six years.

vagina. E.'s mother came out of her room, and appellant lay down next to E.'s bed, pretending to be asleep. E.'s mother asked what was going on, and E. told her that appellant was touching her. Her mother said it was just a bad dream and it would never happen again. E.'s mother told appellant to get out of the room. E. said that appellant touched her over 30 times before she was 10 years old. On one occasion he tried to put his penis in her mouth, but E. resisted. He performed oral sex on her on her 10th birthday. E. told her sister, J. about the incidents.

On cross-examination, E. stated that appellant entered her room once or twice a week to molest her during a period of two years, and therefore he molested her approximately 200 times. When E. told J. what had happened, J. said the same thing had happened to her.

J., E.'s older sister, was 16 at the time of trial. She once saw appellant lifting E.'s covers at night. When J. asked him what he was doing he said he was looking for the rest room.

When J. was nine, appellant pulled down her pants while she pretended to sleep. When she pretended to awaken, appellant lay down on the floor. On another occasion she awoke in her room to find appellant standing next to her bed. Her pants and underwear were pulled down. Appellant also touched J. inside her vagina one time when she was 10. After that incident she told her mother that appellant was touching her. Her mother said nothing. J. once awoke to find blood in her crotch area and appellant beside her bed.

The last incident occurred when J. was 12. Appellant covered her mouth so that she would not scream and tried to pull her pants down. She began kicking and he left.

J. said that appellant touched her inappropriately three to four times a week for three years. E. told J. that appellant was coming into her room and touching her. J.'s father, L. also molested J. When interviewed by a Detective Newman, J. did not tell him about her father because she did not want to get her father in trouble.

On cross-examination J. acknowledged that on at least three occasions after appellant molested her she went into her parents' room and told her mother about it. On

one of these occasions her father told her to go back to bed and that she was dreaming. She knew that appellant rather than her father was molesting her because she could see appellant.

Christopher Davis (Davis) used to date J. in 2005 when J. was 15. One day she told him that her father and her Uncle Raul used to molest her. She said that her uncle used to touch her and that he had also molested her sister, E. Davis was later contacted in February 2006 by a Detective Newman and asked whether J. had told him anything about her uncle.

Defense Evidence

Appellant testified in his own behalf. He said that the molestations described by J. and E. never occurred. On cross-examination he said he slept at their home one night a week, or one night a month or couple of months. He said he was not at their home often. He had a loving and healthy relationship with all his nieces. He never entered their bedroom.

Appellant's sister and the girls' mother, E.A., at first stated that she intended to exercise her Fifth Amendment privilege. She later said she would answer only those questions she had already answered in a prior proceeding. Defense counsel stated he intended to ask her only the same questions he had already asked her, and questioning proceeded.

E.A. said she never saw appellant in the bedroom of her daughters. She never told Detective Newman that she had seen him there. J. entered her mother's bedroom on one occasion and told her that her uncle had touched her feet and on two occasions that he had simply touched her. The first time this occurred, E.A. did not see appellant in the house and did not see his car. She thought J. was dreaming. The second and third times, she could not find appellant and called his wife. She said she once found her husband, L., in bed with her daughter J.A., who was older than J. and E. L. did not have his hands on J.A. Every time J. came and reported a molestation, E.A. would awaken her husband, but he never got out of bed on those occasions.

E.A. acknowledged telling Detective Newman that she did not report finding her husband in bed with J.A. or about his molesting J.A. because she was afraid he would go to jail and she had so many children to take care of. After J. told her that appellant was touching her, she still allowed appellant to come to her home. According to E.A., she told Detective Newman that J. informed her about the molestations by appellant and her father. She did not call the police when J. informed her. Later in her testimony, E.A. denied that J. told her that her uncle tried to touch her vagina and denied telling this to Detective Newman. E. never told E.A. that appellant would try to touch her, and E.A. did not tell Detective Newman that he had. She admitted warning appellant that she would not tolerate any bad intentions with her daughters.

Lilian Maldonado testified that she was appellant's wife, and they had lived together continuously since 1999. Sometime between 2001 and 2003, E.A., the mother of J. and E., called Maldonado after midnight to ask her if appellant had arrived home yet. Maldonado told her he had arrived at 11:00 p.m.

Rebuttal Evidence

Detective Michael Newman of the Los Angeles County Sheriff's Department, Special Victims Bureau, testified that E.A. told him that she had found appellant sleeping on the floor in E.'s room when E. was 10. She woke him up and sent him back to the living room. E.A. said that E. told her that appellant tried to touch her when he came into her room at night on more than one occasion. E.A. said she confronted appellant. J. told E.A. when she was about 11 that appellant "touches her vagina." E.A. confronted appellant about this and he denied it.

DISCUSSION

I. Appellant's Arguments

Appellant contends that, contrary to the trial court's ruling, evidence that E.'s and J.'s natural father, L., molested J. and his stepdaughter, J.A., was admissible to raise a reasonable doubt that appellant molested E. and J., when the third-party culpability evidence is considered with the rest of the evidence. In light of the whole record, defense counsel's theory that E. and J. may have falsely accused appellant in an attempt to keep

their father from going to prison is neither inconceivable nor unreasonable. Appellant also argues that there is no sound reason why propensity evidence is not admissible to prove third party culpability, even though Evidence Code section 1108 is expressly limited to a criminal action in which the *defendant* is accused of a sexual offense. Therefore, the trial court's ruling was erroneous and the People cannot demonstrate beyond a reasonable doubt that the ruling did not contribute to his guilty verdict. As a result, appellant suffered a violation of his state and federal constitutional rights to present a defense.

Appellant further argues that defense counsel's assertions and arguments conveyed the essence of appellant's defense, and it is inconsequential that counsel did not expressly assert appellant's state and federal constitutional rights to present a defense. In the alternative, he maintains that if appellant's argument is otherwise meritorious, his convictions must be reversed on grounds of ineffective assistance of counsel.

II. Proceedings Below

Before trial, defense counsel asked the trial court to take judicial notice of L.'s plea of guilty to three counts of sexually molesting his stepdaughter, J.A., who was the half sister of the victim in count 3, E. The court stated, "if that's why [appellant] elected a court trial, then I'll take your word for it and I'll take judicial notice of it." Defense counsel stated that it was not necessary to argue the relevance of that information at that point.

The prosecutor informed the trial court that she would call J., the victim in the dismissed count 2, to give evidence against appellant under Evidence Code section 1108. The prosecutor informed the court that J. had also accused her father, L., of molesting her in the past after previously denying that he had. The prosecutor did not want defense counsel to ask J. if her father had molested her. The trial court stated that the defense was entitled to attack J.'s credibility by asking her if and why she lied to police at first about L. molesting her. The trial court saw no relevance, however, to the issue of whether L. did or did not molest her.

During direct examination of E.A., defense counsel attempted to question her about what her husband had told her regarding his molestation of J.A. The trial court stated this was hearsay and the hearsay exception for admissions could not be employed by the defense. Defense counsel argued that Evidence Code section 1108 should admit propensity evidence against a third party because it was just as relevant as propensity evidence against the defendant. The trial court responded that there was no "relevance as to whether your client is or is not guilty of fondling the victim in this case as it pertains to whether [L.] molested [J.A.], who was another victim."

After the last defense witness, the defense moved to admit L.'s guilty plea to molesting J.A. into evidence. Defense counsel argued that appellant had done all he could to present a defense. There was another person in the house at the time who was an admitted child molester, L., and the court could consider it a modified or reverse alibi defense.

The prosecutor argued that L.'s conviction was totally irrelevant. The girls specifically identified appellant. J. clearly differentiated between the times her father molested her and the times that appellant did so. The defense "doesn't get an 1108" by saying there was another child molester in the house. The People believed there were two molesters in the house, and whether or not L. pleaded guilty was irrelevant to the instant proceedings.

The trial court stated it would take judicial notice of the conviction in its consideration of all the evidence in the case and would assign the weight to the evidence that it felt was appropriate.

III. Relevant Authority

Evidence of third-party culpability should be treated like any other evidence at trial. (*People v. Lewis* (2001) 26 Cal.4th 334, 372.) A defendant may present evidence of third-party culpability if that evidence is relevant, i.e., capable of raising a reasonable doubt as to the defendant's guilt, and if its probative value is not outweighed by a substantial risk of prejudice, confusion or the undue consumption of time. (*People v. Hall* (1986) 41 Cal.3d 826, 833, 834 (*Hall*); accord, *People v. Bradford* (1997) 15 Cal.4th

1229, 1325 (*Bradford*).) Nonetheless, the court need not admit all evidence of third party culpability, however remote. (*Hall*, *supra*, at p. 833.) Without more, evidence of another's mere motive or opportunity to commit the crime does not suffice to raise a reasonable doubt about the defendant's guilt. Direct or circumstantial evidence connecting the third person to the actual perpetration of the crime is required. (*Bradford*, *supra*, at p. 1325.)

We review the trial court's rulings for an abuse of discretion. (*People v. Cooper* (1991) 53 Cal.3d 771, 816.) "'[T]he trial court is vested with wide discretion in determining relevance.' [Citation.]" (*People v. Sanders* (1995) 11 Cal.4th 475, 512.) A trial court's error in excluding evidence of third-party culpability is reviewed under the test set out in *People v. Watson* (1956) 46 Cal.2d 818, 836 (*Watson*). (*People v. Cudjo* (1993) 6 Cal.4th 585, 611-612 (*Cudjo*).) As a general matter, the application by the trial court of the ordinary rules of evidence does not impermissibly infringe on the accused's right to present a defense. (*Cudjo*, *supra*, at p. 611.)

Evidence Code section 1108, subdivision (a) provides: "In a criminal action in which the defendant is accused of a sexual offense, evidence of the defendant's commission of another sexual offense or offenses is not made inadmissible by [Evidence Code s]ection 1101, if the evidence is not inadmissible pursuant to [Evidence Code s]ection 352." Evidence Code section 352, in turn, provides: "The court in its discretion may exclude evidence if its probative value is substantially outweighed by the probability that its admission will (a) necessitate undue consumption of time or (b) create substantial danger of undue prejudice, of confusing the issues, or of misleading the jury."

IV. No Error

Under *Hall*, third-party culpability evidence is not admissible where it shows merely that another possesses the motive or opportunity to commit the crimes. (*Hall*, *supra*, 41 Cal.3d at p. 833; see also *People v. Harris* (2005) 37 Cal.4th 310, 340.) In the instant case, the fact that E.'s father, L., had molested E.'s sister and stepsister in the past was not sufficient to raise a reasonable doubt as to appellant's guilt. (*Hall*, at p. 833; *Harris*, at p. 340.) To be admissible under *Hall*, the evidence must link a third-party to

the particular crimes charged. Here, the evidence was one of mere opportunity, without more. (See *People v. Geier* (2007) 41 Cal.4th 555, 582.) E. testified that appellant picked her up and took her to the living room the first time he molested her. There was no question of mistaken identity and no evidence L. had ever molested E. Even if he had, this would not absolve appellant of guilt for the molestations he himself committed. Therefore, there was no evidence precluded that rose to the level of direct or circumstantial evidence linking the third person to the actual perpetration of the crime, and we cannot say the trial court erred in refusing to allow appellant to present the third-party culpability evidence. (*Bradford*, *supra*, 15 Cal.4th at p. 1325.)

As occurred in *People v. Geier*, although the trial court did not expressly cite Evidence Code section 352 in making its ruling, we review the ruling rather than the reasoning, and we conclude the trial court was correct. (*People v. Geier*, *supra*, 41 Cal.4th at p. 582, citing *People v. Zapien* (1993) 4 Cal.4th 929, 976 [it is well established that a ruling correct in law will not be disturbed on appeal merely because given for the wrong reason].) Here there was minimal probative value to the evidence, as found by the trial court, and there was a great potential for prejudice in the form of an undue consumption of time in eliciting testimony from L.'s victims about the abuse they endured from him during the instant trial.

In any event, we further conclude any error in excluding further evidence of L.'s crimes was harmless under *Watson*, *supra*, 46 Cal.2d 818, 836. The evidence presented by E. and J. was compelling, and the trial court found the girls credible, whereas it found appellant less than credible. Furthermore, even though appellant was not allowed to introduce the third-party culpability evidence, appellant was tried by the court, and the trial court took judicial notice of L.'s guilty plea. The trial court specifically stated it would consider L.'s conviction along with the other evidence and assign it the appropriate weight.

Moreover, to the extent that it may have been relevant to defendant's theory that the molestation allegations against him were fabricated because E. wished to protect her father as J. had done, appellant had the opportunity to question J., the Evidence Code

section 1108 witness, regarding her prior denial of being molested by L. J. admitted having lied to protect her father in front of the trier of fact, who was also aware L. had pleaded guilty to molesting his stepdaughter, J.A. Consequently the trial court ruled properly and did not exercise its discretion in an arbitrary, capricious or patently absurd manner. (*People v. Rodrigues* (1994) 8 Cal.4th 1060, 1124.)

Finally, Evidence Code section 1108 clearly does not apply to third-party propensity evidence, no matter how fervently appellant argues that it should. As the California Supreme Court has stated, "[r]egarding the purpose of this section, we explained in *People v. Falsetta* (1999) 21 Cal.4th 903, 911, that 'the Legislature enacted section 1108 to expand the admissibility of disposition or propensity evidence in sex offense cases.' Moreover, '[a]vailable legislative history indicates section 1108 was intended in sex offense cases to relax the evidentiary restraints [Evidence Code] section 1101, subdivision (a), imposed, to assure that the trier of fact would be made aware of the *defendant's* other sex offenses in evaluating the victim's and the defendant's credibility.'" (*People v. Abilez* (2007) 41 Cal.4th 472, 502, italics added.)

We also conclude there was no violation of appellant's constitutional right to present a defense. As occurred in *Bradford*, *supra*, 15 Cal.4th at page 1325, "the trial court's ruling did not constitute a refusal to allow defendant to present a defense, but merely rejected certain evidence concerning the defense." The trial court took judicial notice of L.'s conviction and heard testimony from J. during cross-examination that she had lied when she denied L. had molested her. E.A. also acknowledged that J. told her that appellant *and* L. were touching her. Appellant took the stand and denied that he had ever entered his nieces' bedrooms. Therefore, appellant was by no means prevented from challenging the prosecution's case and presenting his theory of defense. "If the trial court misstepped, '[t]he trial court's ruling was an error of law merely; there was no refusal to allow [defendant] to present a defense, but only a rejection of some evidence concerning the defense.' (*In re Wells* (1950) 35 Cal.2d 889, 894.) Accordingly, the proper standard of review is that announced in [] *Watson* (1956) 46 Cal.2d 818, 836, and not the stricter beyond-a-reasonable-doubt standard reserved for errors of constitutional dimension

(*Chapman v. California* (1967) 386 U.S. 18, 24)." (*People v. Fudge* (1994) 7 Cal.4th 1075, 1103.) In this case, the trial court heard all but the details of L.'s molestations of J. and J.A. Given the compelling evidence against appellant and the trial court's credibility findings against him and in favor of the female witnesses, we conclude it is not reasonably probable appellant would have obtained a different result absent the trial court's ruling.

In light of our determinations, it follows that defense counsel was not ineffective. "In order to demonstrate ineffective assistance, a defendant must first show counsel's performance was deficient because the representation fell below an objective standard of reasonableness under prevailing professional norms. (*Strickland v. Washington* (1984) 466 U.S. 668, 687-688.) Second, he must show prejudice flowing from counsel's performance or lack thereof. Prejudice is shown when there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome. (*In re Avena* (1996) 12 Cal.4th 694, 721.)" (*People v. Williams* (1997) 16 Cal.4th 153, 214-215.) The test for prejudice has also been described as an inquiry into "'whether counsel's deficient performance renders the result of the trial unreliable or the proceeding fundamentally unfair.'" (*In re Avena* (1996) 12 Cal.4th 694, 721, citing *Lockhart v. Fretwell* (1993) 506 U.S. 364, 372.)

A reviewing court need not determine whether counsel's performance was defective before examining the prejudice the defendant suffered due to counsel's alleged deficiencies. (*Strickland v. Washington* (1984) 466 U.S. 668, 697.) Because we conclude appellant suffered no prejudice from the trial court's ruling under either interpretation of the effect of such prejudice, there was no ineffective assistance of counsel in this case. (*People v. Williams*, *supra*, 16 Cal.4th at p. 215.)

DISPOSITION

The judgment is affirmed.

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS.

_____, J.

DOI TODD

We concur:

_____, P. J.

BOREN

_____, J.

ASHMANN-GERST